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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Underdog Trucking, LL.C., and Reggie Anders, Plaintiffs, -against- Verizon Communications Inc., Cellco Partnership d/b/a Verizon Wireless, Reverend Al Sharpton, National Action Network, Does 1 through 9, Defendants.	Case No. 16-cv-05654 (VSB)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE MOTION TO DISMISS FILED ON BEHALF OF VERIZON COMMUNICATIONS INC. AND CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

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Defendants Verizon Communications Inc. ("VCI") and Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") (together, "Defendants") submit this memorandum of law in further support of their motion to dismiss the Third Amended Complaint (the "Complaint" or "Compl.") alleging Defendants tortiously interfered with a contract between Plaintiffs and Defendant Reverend Al Sharpton and his organization, Defendant National Action Network (together, "Sharpton"), pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

In an apparent recognition of the deficiencies contained in the Complaint, Plaintiffs Underdog Trucking LLC ("Underdog") and Reggie Anders have asserted multiple new facts outside the Complaint that completely contradict the Complaint, essentially attempting to amend it for a fourth time. For example, with their Opposition to this motion, Plaintiffs have filed an Affidavit executed by Anders on April 19, 2017 ("4/19/17 Anders Aff."). In opposing the motion to dismiss brought by Sharpton, Plaintiffs submitted a different affidavit, executed by Anders three months earlier (and approximately two months before the current version of the Complaint was filed) on January 7, 2017 ("1/7/17 Anders Aff."), as well as an affidavit by David L. Wade ("Wade Aff."). As detailed below, there are striking inconsistencies between the Complaint, these three affidavits, and the claims Plaintiffs are now making in their Opposition; these inconsistences should bar them from consideration. Even accepting these allegations as true, however, the Complaint must be dismissed as Plaintiffs have still failed to state a claim of tortious interference against Defendants.

I. The New Affidavits Should Not Be Considered

Plaintiffs' efforts to essentially amend the Complaint yet again by providing new affidavits containing information well beyond that in the Complaint should not be permitted. "In considering a motion under Fed. R. Civ. P. 12(b)(6) to dismiss a complaint for failure to state a claim on which relief can be granted, the district court is normally required to look only to the allegations on the face of the complaint." *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (limiting consideration of documents other than the complaint to those that are "[a]ttached to the complaint or incorporated in it by reference" or documents "upon which [the complaint] *solely* relies and which is *integral to the complaint*") (emphasis in original). These affidavits were not referenced in the Complaint and indeed, one of them post-dates the Complaint by a month. This is not a *pro se* plaintiff who should be given every benefit of the doubt. Plaintiffs have been represented since the commencement of this action and are already on their third amended complaint; if additional information had been necessary or relevant, it should have been included in one of the previous versions of the Complaint. Because these Affidavits are beyond the scope of the Complaint, they should be disregarded.

II. Even Considering the Newly Embellished Facts, Plaintiffs Have Failed to State a Cause of Action for Tortious Interference with Contract

Defendants moved to dismiss the Complaint because Plaintiffs failed to allege any of the requisite elements of a *prima facie* case for tortious interference with a contract. Even if the new factual allegations contained in the Opposition and Affidavits were to be considered, Plaintiffs' claim must still fail as Plaintiffs have failed to allege: (1) the existence of a valid contract with a third party; (2) Defendants' knowledge of that contract; (3) Defendants' intentional and improper procuring of a breach, or (4) damages. *See Jill Stuart (Asia) LLC v. Sanei Int'l Co.*, 548 Fed. Appx. 20, 22 (2d Cir. 2013) (*quoting White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426, 835 N.Y.S.2d 530, 532 (N.Y. 2007)). Because Plaintiffs' claim against Defendants is wholly deficient, it must be dismissed.

A. *There Was No Valid Contract Between Plaintiffs and Sharpton*

Plaintiffs' claim for tortious interference must fail as Plaintiffs have still failed to plead that there was a valid contract between Plaintiffs and Sharpton. Acknowledging that the Complaint essentially describes a contract between Plaintiffs and Sharpton to extort a settlement from Defendants for lawsuits that Defendants already won, Plaintiffs are now claiming an entirely different purpose for the contract. These contradictory statements cannot undo the fact that this agreement to extort should not be enforced as it would violate public policy to do so. Moreover, these contradictions only go further to show that there was no valid contract because the purpose of the agreement was too ambiguous to be enforced. For these reasons, Plaintiffs' claim must be dismissed.

1. Plaintiffs' New Allegations Cannot Change the Purpose of the Contract

In an apparent recognition of the fact that the contract described in the Complaint violates public policy by seeking to force Defendants to settle already litigated claims, Plaintiffs have attempted to recast their contract with Sharpton as one meant merely to use his media presence to "let others learn from Plaintiff's experiences so that others in the same position may know what doing business with Defendant[]s would entail." (Opp. p. 4-5.) Indeed, Plaintiff's Memorandum of Law in Opposition to the Motion of Defendants Reverend Al Sharpton and National Action Network to

Dismiss Plaintiffs' Third Amended Complaint ("Pl. Sharpton Opp.") contains an entire section entitled "This is Not an Action to Settle the Dismissed 2009 and 2010 Actions." (Pl. Sharpton Opp. p. 11.) This is entirely at odds with the allegations in the Complaint, however, in which Plaintiffs directly alleged that they entered into the contract in order to achieve a settlement from Defendants.

Specifically, the Complaint claims that Anders started reaching out to clergy "after he felt that said lawsuit aforesaid was unfairly dismissed in 2013" and that Plaintiffs' agents "sent defendants Verizon and Cellco a demand letter stating if this situation was not resolved, that the community of Reverends would call for a boycott against Verizon with Reverend Al Sharpton leading the charge." (Compl. ¶¶8-9.) The Complaint further alleges that Plaintiffs entered into the contract with Sharpton so that Sharpton would assist in setting up "mediation with Verizon Communications," would "arrange a meeting with the CEO of Verizon and address the issues regarding Reggie Anders' treatment by Verizon, and if that didn't get any results then he would make a lot of noise via his media programs exposing them for the discriminatory and racist[] practices against [Plaintiffs]" and "Sharpton . . . would contact Verizon and Cellco to settle a dispute out of court and if settlement did not occur, use Al Sharpton's Radio and television shows to bring negative public attention to discriminatory practices of Verizon and Cellco." (Compl. at ¶¶ 16, 20, 49.) Many of these same allegations are repeated in the 1/7/17 Anders Affidavit and Wade Affidavit, as well as Pl. Sharpton Opp. (*See* 1/7/17 Anders Aff. ¶¶ 6, 9; Wade Aff. ¶ 11-12; Pl. Sharpton Opp. p. 7-8.) The 4/19/17 Anders Affidavit states that prior to entering into the agreement with Sharpton, Plaintiffs' agents sent a letter "demanding that an agreement be worked out between my company, Underdog Trucking, LLC and Verizon Wireless and that they would be bringing Al

Sharpton and national pressure against Verizon if no action was taken." (4/19/17 Anders Aff. ¶ 9.) All of this clearly shows that the intent of the alleged agreement was to coerce Defendants into a settlement in order to avoid negative publicity.[1]

Moreover, many of Plaintiffs' claims simply do not make sense if this was just a contract to publicize Plaintiffs' alleged mistreatment by Verizon. For instance, Plaintiffs claim in the Complaint that they were initially satisfied that Sharpton was allegedly setting up a meeting with Verizon; but why would Plaintiffs need to meet with Verizon if this was merely a contract for "negative advertising"? (Compl. ¶ 21, 35, 36; Opp. p. 5.) Why would Sharpton allegedly have informed "Reggie Anders that Verizon and NAN had been made aware of the contract," unless they were hoping to get something from Verizon? (Compl. ¶ 29.) Why would Sharpton ask Anders if he would be willing to go back to work with Verizon, unless Plaintiffs were hoping to achieve some sort of settlement before "exercising their First Amendment rights"? (Compl. ¶ 37; Opp. p. 5, 8.) All of these allegations further show that the purpose of the alleged contract was to coerce a settlement from Defendants, and Plaintiffs' belated efforts to entirely change the terms of the alleged agreement cannot change this fact.

Thus, it is clear from the allegations contained in the Complaint and the Affidavits that Plaintiffs were, in fact, seeking to extort or coerce money from Defendants and not merely publicize their alleged mistreatment. Because the contract

[1] Further illustrating the coercive nature of the alleged contract, the first Amended Complaint specifically claimed that Plaintiffs contacted Sharpton "to help mediate between [Verizon Wireless] and the Plaintiff to resolve a discrimination claim" and that payment was made in return for Sharpton "contacting the management of Verizon Wireless and setting up mediation meetings and other arrangements with plaintiff." (Docket Entry #4, Amended Compl. ¶¶ 10-11.) The Amended Complaint further alleged that "defendants entered into an improper conspiracy to give plaintiffs the impression that progress was being made on his underlying out of court negotiation following failure of the claim in court." (Amended Compl. ¶ 16.)

was for an illegal purpose and violative of public policy, it was not valid and cannot serve as the basis of a claim for tortious interference. *See McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 469, 199 N.Y.S.2d 483, 485, 166 N.E.2d 494 (1960); *Carruthers v. Flaum*, 365 F. Supp. 2d 448, 462 (S.D.N.Y. 2005).

2. The Terms of the Agreement are Too Ambiguous to be Enforceable

Even if the contract was not for an illegal purpose and did not violate public policy, Plaintiffs' equivocating statements concerning its terms further show that there was no valid agreement between the parties as there were no definite and explicit terms to the contract. In order to be enforceable, "the agreement between the parties must be definite and explicit so that their intention may be ascertained with a reasonable degree of certainty." *Winston v. Boisclair*, No. 88-cv-7836, 1991 WL 150613, at *7 (S.D.N.Y. July 31, 1991), *aff'd*, 993 F.2d 1532 (2d Cir. 1993). Where Plaintiffs cannot even identify the terms of the alleged agreement without contradicting themselves, they have failed to plead the existence of an unambiguous and valid contract that could be enforced.

B. *Plaintiffs' Inconsistent Pleadings Fail to Allege that Verizon Wireless and VCI Had Any Knowledge of the Contract*

As Defendants have pointed out, Plaintiffs have not alleged that Defendants had any knowledge of the agreement with Sharpton prior to the alleged interference with the contract.[2] The Complaint and first Anders Affidavit alleged that Anders learned of the supposed payment made by Verizon to Sharpton through a January 4, 2015 *NY Post* article. (Compl. ¶ 26; 1/7/17 Anders Aff. ¶ 13.) Anders then allegedly called McGuire after that date to inform him of the *NY Post* article and told him "about the contract" at

[2] Plaintiffs have also ignored their other contradictory allegation – that "Sharpton had been paid hush money by Verizon for years" before the contract was even entered into. (Compl. ¶ 12.)

that time. (Compl. ¶ 28-29; 1/7/17 Anders Aff. ¶ 22.) These allegations specifically allege that Anders only informed McGuire of the contract *after* the payment was made, undermining any claim that Defendants were aware of the contract and thus could have interfered with it. In a desperate attempt to remedy the shortcomings of the Complaint, Plaintiffs now claim that "Defendants made a huge payment to Defendants Al Sharpton and the National Action Network *after* the conversation between Plaintiff Reggie Anders and Ray McGuire, counsel for the Defendants" in which McGuire allegedly "promised to relay the information about the contract to Defendants who responded by paying off defendant Al Sharpton and the National Action Network." (Opp. p. 7-8, emphasis added.) This revision of the facts, directly contradicting the Complaint, is wholly inadequate to remedy Plaintiffs' pleading deficiencies.[3]

Without more, all Plaintiffs can point to is their allegation that Sharpton claimed to Plaintiffs that he had informed Verizon of the agreement when he was allegedly trying to buy time with Plaintiffs to perform the agreement. This allegation is undermined by Wade's admission that "no concrete proof had ever been extended to me, and [Anders] told me he never received any proof either" that Sharpton had been in communication with Verizon, and "to this day, there has never been any paper trail or documentation of a conference call or other communication that occurred." (Wade Aff. ¶¶ 16, 22, 23.) For

[3] Although Plaintiffs also claim that based on a letter Plaintiffs' attorney Benjamin Taylor sent in 2013, Defendants were aware that "we would be bringing in Al Sharpton and the National Action Network" and therefore were aware that "they were buying Al Sharpton's silence," this is contradicted by the fact that Plaintiffs also claim that Sharpton was not even contacted until July 2014 after "the demand letter . . . was unsuccessful." (4/19/17 Anders Aff. ¶ 11; Wade Aff. ¶¶ 5-6.) Indeed, Anders acknowledges that at this time, he was also considering getting help "in the same manner" from Rev. Jesse Jackson instead of Sharpton. (Compl. ¶ 12.) As this is a claim for tortious interference with an existing contract, rather than tortious interference with prospective business relations, these new allegations do nothing to meet Plaintiffs' burden of pleading that Defendants had knowledge of the alleged agreement prior to the alleged tortious interference

the reasons discussed in the initial Motion, this vague allegation is insufficient to plead knowledge by Defendants of the alleged agreement.

Because Plaintiffs have failed to plead that Defendants had any knowledge of the alleged agreement prior to the alleged payments to Sharpton, the claim must be dismissed.

C. *Plaintiffs' Have Still Failed to Plead that Verizon Wireless or VCI's Actions Caused a Breach of the Agreement or that Plaintiffs Suffered Damages as a Result*

In order to survive a motion to dismiss, a "[p]laintiff must allege that the contract would not have been breached 'but for' [the defendant's] conduct." *Vazquez v. Salomon Smith Barney Inc.*, No. 01-cv-2895, 2002 WL 10493, at *6 (S.D.N.Y. Jan. 4, 2002) (*citing Washington Ave. Assocs. v. Euclid Equip.*, 229 A.D.2d 486, 487, 645 N.Y.S.2d 511, 512 (2d Dep't 1996)). Even considering the new allegations contained in the Affidavits and Oppositions, Plaintiffs have failed to rebut any of the arguments made in VCI and Verizon Wireless' motion and have thus failed to allege that Sharpton would have performed under the alleged contract "but for" Defendants' involvement.

Similarly, Plaintiffs have still failed to allege that the contract was actually breached by Sharpton or that they were damaged by the alleged interference. If, as Plaintiffs now allege, the contract was merely to publicize their alleged mistreatment, and not to recover a settlement from Defendants, it is even harder to fathom what damages Plaintiffs allegedly suffered by not getting this media attention.

Because Plaintiffs have failed to allege these requisite elements for a claim of tortious interference, their claim must be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint against Verizon Wireless and VCI should be dismissed in its entirety. Verizon Wireless and VCI further request that they be awarded attorneys' fees, costs, expenses and such further relief as the Court deems just and proper.

Dated: New York, New York
May 11, 2017

Respectfully submitted,

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